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# Supreme Court of the United States

OCTOBER TERM, 1941.

No. 51.

IRVING TRUST COMPANY and THOMAS F. McGLONE, JR., as Executors under the Last Will and Testament and Codicil thereto of John J. McGlone, Deceased, *et al.*,

Appellants,

—vs.—

CHASE L. DAY, as Executor under the Last Will and Testament of Helena Day McGlone, Deceased,

Respondent.

APPEAL FROM THE SURROGATE'S COURT, KINGS COUNTY, STATE OF NEW YORK.

## BRIEF OF APPELLANTS EDWARD McGLONE AND ROBERT McGLONE, INFANTS, BY RALPH L. KASKELL, JR., SPECIAL GUARDIAN.

RALPH L. KASKELL, JR.,
Special Guardian for Appellants
Edward McGlone and Robert McGlone,
Infants.

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### I.

### STATEMENT OF THE CASE.

The facts in this matter are not in dispute. They are to be found in the pleadings (R., 8-19) and in the short transcript of the hearing before the Surrogate (R., 19-22A).

Briefly, it suffices to say that Helena Day Snyder and John J. McGlone were married on February 4th, 1922. Before the marriage the prospective bride had executed and delivered the following document (R., 16):

"The Beverleys,
Osterley, Middlesex, England
February 2–1922.

Savoy Hotel,
London
WC 2

I, Helena Day Snyder, being of sound mind and in possession of all my faculties, on the eve of my marriage to John J. McGlone, in London, England, on February 4th, 1922, wish to record, of my free will, that, as I already possess, in my own right, ample of this world's goods in the way of a fortune of my own, as a compliment to my aforesaid husband, and for other good and sufficient reasons, I hereby, voluntarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized.

Helena Day Snyder"

Two days later the parties were married.

In August, 1930, McGlone made a will which bequeathed $2,000.00, or the equivalent in jewelry, to his wife. On September 1st, 1930, Section 18 of the Decedent Estate Law became effective, and, as amended, Subdivision 9 reads as follows:

> "The husband or wife during the lifetime of the other may waive the right of election to take against a particular last will and testament by an instrument subscribed and duly acknowledged, or may waive such right of election to take against any last will and testament of the other whatsoever in an agreement so executed, made before or after marriage. An agreement so executed made before the taking effect of this section wherein a spouse has waived or released all rights in the estate of the other spouse shall be deemed to release the right of election granted in this section."

In 1934 Mr. McGlone made a codicil which in no way affected the gift to Mrs. McGlone. In 1937 Mr. McGlone

died, and his widow then filed a claim to take one-half of his estate against his will.

The Court of Appeals, in an opinion by Chief Judge Lehman, has decided that the statute, effective in 1930, requires an acknowledgment for any agreement or waiver, whether executed before or after the effective date of the statute (R., 51). The Court of Appeals, for the purposes of this case, admits "that the instrument of waiver, though (fol. 82) unilateral in form, evidences 'a contract made between persons in contemplation of marriage' within the meaning of Section 53 of the Domestic Relations Law (Cons. Laws, ch. 14); that it is executed in manner which satisfies the requirements of Section 31 of the Personal Property Law (Cons. Laws, ch. 41); and that any contractual rights created by that instrument are within the protection of the constitutional guaranty that the State may not impair the obligations of contracts or take property without due process of law."

The Court of Appeals then poses the only question before this Court: "what are those contractual or property rights which it is said are destroyed by the new statute?" (R., 52). From that point on it is our contention that the learned Court erred in concluding that nothing worthy of protection had been retroactively destroyed by the legislature of the State of New York.

The brief of the other appellants, contains all the formal statements necessary for the appeal and, to avoid repetition, this appellant will adopt said portions of that brief.

## II.

## ARGUMENT.

POINT A. It is conceded by the Court of Appeals that on February 2nd, 1922, Mrs. Helena Day Snyder made a valid contract with John J. McGlone with reference to their forthcoming marriage. The learned Court below also reaffirms the proposition that any contractual or property rights obtained in said contract are protected by Section 10,

Article I, and Section 1 of the Fourteenth Amendment of the Constitution of the United States.

POINT B. The instrument signed by Mrs. Helena Day Snyder gave her prospective husband definite rights arising out of contract alone. The future Mrs. McGlone bound herself to (a) not attempt to claim against the will of John J. McGlone, if any, and (b) not to interfere in any way with his estate if he died intestate. That contract, good when made, incorporated within itself all the existing law of the State of New York pertaining to that situation. Under that law that contract was concededly valid. The contractual right, of restraining Mrs. McGlone, became a vested contractual or property right of John J. McGlone, capable of enforcement by his heirs or next of kin. No statute may, within the Constitution of the United States, destroy that right.

POINT C. If the instrument be treated as a complete present transfer of all rights, present or future, in McGlone's estate, then it is not possible to justify the destruction of that instrument by subsequent legislation. The present transfer by a deed of future rights, is a recognized legal transaction; and, at the time this instrument was executed, it was so honored. The attempt to destroy that transfer, release, or deed, is clearly a violation of Section 1 of the Fourteenth Amendment.

## POINT A.

## THE INSTRUMENT WAS A VALID CONTRACT UNDER THE LAW OF THE STATE OF NEW YORK ON THE DATE OF ITS EXECUTION.

Although Chief Judge Lehman concedes the validity of the instrument as a contract (R., 52) it may be well to note again that the document was properly executed pursuant to Section 31 of the Personal Property Law (Cons. Laws, ch. 41), which read in part:

"Section 31, Personal Property Law:

AGREEMENTS REQUIRED TO BE IN WRITING.—Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or his lawful agent, if such agreement, promise or undertaking:

* * * * *

3. Is made in consideration of marriage, except mutual promises to marry."

The statutory law as to the force of such a document is contained in Section 53, Domestic Relations Law (Cons. Laws, ch. 14), wherein it was stated:

"Section 53, Domestic Relations Law:

CONTRACTS IN CONTEMPLATION OF MARRIAGE.—A contract made between persons in contemplation of marriage, remains in full force after the marriage takes place."

There is no claim of dower in this case so that Section 197 of the Real Property Law (Cons. Laws, ch. 49) has no application. There is no requirement of an acknowledgment; there is no requirement that such an instrument be witnessed; the sole requirement is that the instrument be in writing and subscribed by the person to be charged therewith. The case law applicable to such documents is well set forth by Judge Cardozo and Judge Crane in *De Cicco* v. *Schweitzer*, 221 N. Y. 431, 438, 439 and 440; and by Mr. Justice Scudder in *Schnibbe* v. *Schnibbe*, 109 Misc. Rep. 382, affirmed in 193 App. Div. 895, 179 N. Y. Supp. 54, on the opinion of Mr. Justice Scudder. Those cases serve to show that the law favors ante-nuptial agreements; that consideration in the technical sense is not required; and that, if consideration is needed, then marriage is good consideration.

Today the only change in the law is the added requirement that such a document be acknowledged (Subdivision 9, Section 18, Decedent Estate Law, Cons. Laws, ch. 13).

## POINT B.

## THE INSTRUMENT GAVE JOHN J. McGLONE CONTRACTUAL RIGHTS WHICH A SUBSEQUENT STATUTE MAY NOT, WITHIN THE CONSTITUTION, DESTROY.

It is at this point that the appellants believe the learned Court below erred. As the opinion of the Court of Appeals correctly states (R., 52), "Since rights of descent and distribution of a decedent's estate are created by the law of the State, the State may change or take away such rights though it may not take away property which has vested by virtue of such rights (*Matter of Sherman*, 153 N. Y. 1; *Norris* v. *Beyea*, 13 N. Y. 273)."

There can be no quarrel with that view of the law. The state may well abolish the right to make a will. It may even abolish the entire right to have property descend and be distributed to heirs and next of kin. It is our contention, however, that the state's power to do all of the foregoing does not give it the power to release a widow from contractual obligations solemnly agreed to by her, and which obligations were valid and binding on the date when she undertook the same (*Coolidge* v. *Long*, 282 U. S. 582, 595, 596). The state could destroy McGlone's right to make a will, but not his right to hold Mrs. McGlone to her agreement.

Let us assume that the state abolished the right to make a will. Mrs. McGlone had waived her right to take any share in the estate of her husband even though he died intestate. The instrument is broad and conclusive.

> "I hereby, volantarily and irrevocably, renounce all right, title and interest I might, legally or otherwise, have in any estate, real or personal, of which my said husband to be, John J. McGlone, might die seized."

What do those words mean if not that the prospective bride wanted nothing from the estate of her prospective husband? The Courts of the State of New York recognized the

validity of a waiver of the right to share in a spouse's intestate estate.

*In Re Gilmour*, 146 Misc. Rep. 113, 260 N. Y. S. 761;
*In Re Griffith's Will*, 167 Misc. Rep. 366, 3 N. Y. S. (2) 925;
*In Re Loeb's Estate*, 155 Misc. Rep. 354, 280 N. Y. S. 354.

We do not deny the sovereign right of the State of New York to change the laws of descent and distribution, at will, provided vested rights are not destroyed. But it would be a mockery of the Constitution if that theory could be used to impair or destroy a good contract, secured in good faith by a prospective husband, made by the prospective bride to obtain marriage, and executed in accordance with all the existing requirements of law. What could prevent the Legislature of the State of New York from now requiring several witnesses in addition to the acknowledgment, and thus invalidating all contracts made between 1930 and 1941?

The Court of Appeals goes on to state (R., 53) that the contract is destroyed not by the statute itself but by the fact that the testator executed a codicil after the effective date of Section 18 of the Decedent Estate Law. That is quite a specious argument. Section 18 did not declare that waivers are void and against public policy. Section 18 did not require anything more for a good waiver other than an acknowledgment. There is nothing in Section 18 which says that the husband executes a will at the peril of waiving all prior contracts made with his wife, or prospective wife. Will the Court read into that statute a forfeiture? It is usually the rule that a forfeiture must be plainly set forth or else the Court will refuse to so find. Nothing in the entire law effective in 1930 would show a legislative intent to destroy all existing contracts. Rather there is merely an added requirement of an acknowledgment which the legislature incorrectly tried to apply retroactively. If, as Chief Judge Lehman says, "The legislature did not decree that a

will previously executed should not take effect at the testator's death in accordance with its terms", is there not so much more reason for protecting a pre-existing contract, something already a binding fixed obligation, and a vested right? The legislature had the right to destroy previously executed wills since nothing vests under a will until the death of the testator. If the legislature intended to have the execution of a codicil work the utter destruction of previously valid contracts that language would have been set forth in explicit terms.

The attitude of this Court is well set forth in *Osborn* v. *Nicholson*, 80 U. S. 654, 662, wherein it was stated at page 662:

> "Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose of and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to the 'general principles of law and reason', and of one of the most vital ends of government. The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. * * * The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And this deprivation would be 'without due process of law'. This is forbidden by fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the states and the Nation."

See also:

*Webster* v. *Cooper*, 55 U. S. 488;
*White* v. *Hart*, 80 U. S. 646.

## POINT C.

## THE PROPERTY RIGHTS TRANSFERRED BY THAT INSTRUMENT, WHETHER PRESENT OR FUTURE, COULD NOT BE RETROACTIVELY DESTROYED.

If we consider the instrument as a present release or transfer of rights, either of immediate or future enjoyment, to either McGlone or to still undetermined beneficiaries of his estate, it is clear under the cases that a subsequent statute can not be permitted to destroy the transfer.

*Coolidge* v. *Long*, 282 U. S. 582;
*Webster* v. *Cooper*, 55 U. S. 488, 501-504;
*United States* v. *Heinrich*, 12 Fed. Rep. (2nd) 938, 940;
*Aetna Life Ins. Co.* v. *Hoppin*, 214 Fed. Rep. 928, 935.

## CONCLUSION.

Considering this case in the light of the implications of the decision of the Court of Appeals, the appellants are constrained to submit that a reversal of the decision of said learned Court is required in order to prevent confusion and hardship. This case may well be the means of settling an untold number of disputes. An affirmance of the decision below would result in a declaration that it is impossible for a prospective husband and prospective wife, and a husband and wife, in the State of New York, to make a binding agreement between themselves with reference to their property.

It is respectfully submitted that the decision of the Court of Appeals, and the decree entered thereon, should be reversed.

Respectfully submitted,

RALPH L. KASKELL, JR.,
Special Guardian for Appellants
Edward McGlone and Robert McGlone,
Infants.